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Adapting to BAPCPA

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ADAPTING TO BAPCPA

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"From the perspective of consumer law in general, the most striking feature of consumer bankruptcy practice is that it exists. It not only exists--it is a booming practice area, one of the few where middle to lower-middle class consumers are not only served, but are the mainstay of the practice." [1]

Consumer bankruptcy and its practice still exist, despite the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), [2] which could have been a catastrophe for the system. Although the legislation's proponents argued that the statute was necessary to prevent abusive "can pay" debtors from obtaining the easy discharge of their debts, [3] many commentators understood from the beginning that the real risks to consumer bankruptcy were the statute's side effects: that it would raise costs, reduce access across the income spectrum, and generally make the system unworkable. [4]

As I have argued elsewhere, this contradiction between BAPCPA's stated goal and its likely effects was not a coincidence but rather the result of a strategy used in the long-term contraction of the United States safety net. [5] The fear of abuse by non-needy individuals is endemic to U.S. safety net ***184** programs, which enables policymakers who oppose the safety net to use heightened abuse screening as a way of implementing procedural barriers that make the system less accessible to all--a technique known as "bureaucratic disentitlement." [6]

At the time of BAPCPA's passage, many feared that it would, in fact, effectively dismantle the consumer bankruptcy system. I recently interviewed fifty-three consumer bankruptcy attorneys about BAPCPA, and a significant minority of them described fearing the worst. As one put it, "My fear when it passed is that bankruptcy was going to go away." [7] Another attorney more colorfully stated that "It was panic times." [8] Others described thinking that "Chapter 7 would nearly disappear as an option" [9] or that "[T]he middle class wasn't going to be able to file." [10] A related fear was that "[I]t would make the ability to practice consumer bankruptcy law virtually impossible," [11] "devastate the debtor practice," [12] or "be so draconian" that practitioners' jobs would become infeasible. [13]

These anxieties were reasonable because a number of BAPCPA provisions appeared likely to impair the consumer bankruptcy system's ability to function. The means test [14] at the "heart" [15] of the legislation was expected to be over-inclusive, sweeping up struggling debtors as well as abusers; [16] generate litigation that would "burden the courts for decades to come"; [17] mire ***185** debtors in overwhelming paperwork; and drive up costs. [18] Similarly, the credit-counseling requirement [19] presented concerns that it would cause delays, [20] raise costs, [21] humiliate debtors, [22] and push

them into the hands of an exploitive industry that would "poach" potential clients by luring them into debt management plans. [23]

Another set of fears concerned the "reasonable inquiry" certification, [24] potential sanctions, [25] attorney liability, [26] and audits of case files [27] that collectively threatened to punish attorneys for not conducting a level of investigation that would make practicing consumer bankruptcy law prohibitively expensive. [28] BAPCPA also targeted attorneys with the "debt relief agency" provisions [29] that seemed likely to confuse consumers with inaccurate information, [30] blur the distinction between lawyers and bankruptcy petition ***186** preparers, [31] interfere with attorney consultations, [32] increase attorney costs, and "shame" consumer bankruptcy law firms out of practice. [33] There were, of course, many other provisions with the potential to make the consumer bankruptcy system less functional. Examples include the limited automatic stay for repeat filers, [34] the ability of creditors to designate an address for bankruptcy correspondence, [35] and the elimination of ride through. [36]

Some of these scenarios materialized, but many did not. In fact, with a few exceptions, the harm that remains a decade later boils down to the increased costs of filing [37] and related ways that BAPCPA made consumer ***187** bankruptcy less accessible. In other words, it was BAPCPA's indirect effects rather than its direct ones that are still relevant, a trend that applies not only to the means test but also to credit counseling, the limited stay for repeat filers, the audits, and the "debt relief agency" provisions. [38]

Even taking indirect effects into account, the sky did not fall on bankrupt consumers or their attorneys. [39] Filings are down, [40] and BAPCPA may be partially responsible, [41] but the system has not become dysfunctional as it has for other safety net programs that experienced bureaucratic disentitlement. [42] For example, there is no evidence suggesting that debtors now face excruciatingly long waits as the consumer bankruptcy system processes their cases, [43] a problem that has befallen other programs. [44] And consumer bankruptcy attorneys have not fled. [45] As one interviewee stated, "BAPCPA was a significant change but I am still here." [46] More generally, one of my interview questions was whether participants knew attorneys who had left the practice because of BAPCPA. Among the attorneys who responded affirmatively, most mentioned ***188** only "dabblers" and those who were already near retirement. [47] Attorneys are also still representing the overwhelming majority of consumer bankruptcy filers. The rate of *pro se* filings appears to have decreased post-BAPCPA. [48]

My goal for this article was to begin answering the question of how consumer bankruptcy survived. I have previously argued that the reason is its location in the judicial system, and that attorneys, judges and other system actors play a protective role. [49] In other programs targeted by bureaucratic disentitlement, potential beneficiaries become mired in seemingly endless paperwork, documentation requirements, and appeals. [50] I had some evidence that consumer attorneys helped prevent these negative scenarios; post-BAPCPA *pro se* filers had worse outcomes than both their pre-BAPCPA counterparts and post-BAPCPA represented debtors. [51] So it made sense to ***189** begin this project by seeking to understand how consumer bankruptcy practice adapted to BAPCPA.

I interviewed fifty-three consumer bankruptcy attorneys through a snow ball sample, meaning that I began with a few interviewees I already knew, who referred me to other potential candidates. [52] The next rounds of interviewees provided additional referrals until I reached the point at which I was not learning new information from the most recent interviews.

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